A **MENTERI KEWANGAN & ANOR v. WINCOR NIXDORF (M) SDN BHD**

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
HAMID SULTAN ABU BACKER JCA
B ZAKARIA SAM JCA
[CIVIL APPEALS NO: W-01-381-09-2012 & W-01-189-04-2012]
9 MAY 2016

C ***ADMINISTRATIVE LAW:*** *Judicial review – Jurisdiction – Courts – Scope of review – Whether there was distinction between inferior tribunals and executive decision makers – Whether courts could substitute decision without remitting it for re-adjudication by decision maker – Whether executive decisions could be substituted by an order of court – Whether order of mandamus premature*

D This was the appellants' appeal against the decision of the High Court Judge ('HCJ'), on the grounds essentially that it was wrong for the HCJ in a judicial review application to substitute the decision of the executive and/or its department and/or its agencies. The appellants' complaint was against the High Court's decision (i) to quash the decision by the first appellant in refusing to allow any remission to the respondent under s. 14A of the E Customs Act 1967 and s. 33 of the Sales Tax Act 1972; and (ii) in not remitting back the matter to the first appellant for a fresh consideration and in granting full remission thereof to the respondent instead. The HCJ had taken the position that there was no distinction between the inferior tribunals and the executive decision makers in the sense that the High Court could, in F deserving cases and based on the circumstances of the particular case, substitute a different decision in place of the impugned decision of the decision maker without remitting it for re-adjudication by the decision maker.

Held (allowing appeal in part)
G **Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:**

(1) As a general rule, it is not permissible to substitute legislative and/or executive decision though it may be permissible to order *mandamus*, etc within the framework of the Constitution and the law and/or give prerogative direction which if not complied with may attract the H jurisprudence relating to contempt. By quashing the decision means it gives the executive another opportunity to reconsider the decision according to law. Only when constant disobeyance is made that an order of *mandamus* may be issued unless it is related to specific legal right or constitutional right where an order for *mandamus* can be issued in the I first instance. It is trite that a remedy in the nature of *mandamus* is drastic and generally, it is only invoked in extraordinary situations after the courts have been satisfied that the applicant had exhausted all other avenues available to him. (para 11)

(2) The powers of the High Court is not just limited to issuing prerogative writs but extends so far as to enable the court to issue any appropriate orders or directions. The parameter of judicial intervention in the decision of inferior tribunal which has no nexus to the executive is much wider. However, there was no case directly on point in England or Malaysia cited by the parties to say that the executive decision could be substituted by an order of court as of right. None of the cases supported the proposition that executive decisions could be substituted in judicial review application as of right more so when there were other reasonable options available to enable the executive to review their decision. (paras 12 & 13)

(3) It is trite that *mandamus* or prohibition falling under the common law prerogative writs is issued when a legal and/or constitutional rights have been infringed and/or order of court had not been complied by the executive within the spirit and intent of the orders made by court. An order for *mandamus* and/or prohibition at this stage was premature and the more appropriate order would be to quash the decision of the appellant which was rightly done by his Lordship. In consequence, the matter was to be remitted back to the appellant for the "assessment of the remission". (para 15)

***Bahasa Malaysia** Headnotes*

Ini adalah rayuan perayu-perayu terhadap keputusan Hakim Mahkamah Tinggi ('HMT'), atas alasan bahawa HMT khilaf dengan menggantikan keputusan eksekutif dan/atau jabatannya dan/atau agensi-agensinya dalam satu permohonan semakan kehakiman. Aduan pihak perayu adalah terhadap keputusan Mahkamah Tinggi (i) yang membatalkan keputusan perayu pertama kerana enggan membenarkan apa-apa remitan kepada responden di bawah s. 14A Akta Kastam 1967 dan s. 33 Akta Cukai Jualan 1972; dan (ii) yang tidak meremitkan kembali perkara itu kepada perayu pertama untuk pertimbangan baru dan dalam membenarkan sebarang remisi sepenuhnya kepada responden. HMT memutuskan bahawa tiada perbezaan di antara tribunal-tribunal lebih rendah dan pembuat-pembuat keputusan eksekutif dengan pandangan bahawa Mahkamah Tinggi boleh, dalam kes-kes tertentu dan berdasarkan keadaan sesuatu kes, menggantikan satu keputusan berbeza sebagai pengganti keputusan yang dipersoalkan oleh pembuat keputusan tanpa meremitkannya untuk pembuat keputusan menghakimi semula.

Diputuskan (membenarkan sebahagian rayuan)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Sebagai peraturan am, menggantikan perundangan dan/atau keputusan eksekutif tidak dibenarkan walaupun ia dibenarkan membuat perintah *mandamus,* dan sebagainya dalam rangka Perlembagaan dan undang-

undang dan/atau memberikan arahan prerogatif yang jika tidak dipatuhi boleh meraih perundangan yang berkaitan dengan penghinaan. Dengan membatalkan keputusan bermaksud ia memberikan eksekutif satu lagi peluang untuk mempertimbangkan semula keputusan berdasarkan undang-undang. Hanya apabila ketidakpatuhan berterusan dibuat baru satu perintah *mandamus* boleh dikeluarkan, melainkan ia berkaitan hak undang-undang khusus atau hak perlembagaan di mana perintah *mandamus* boleh dikeluarkan pada permulaannya. Adalah matan bahawa remedi bersifat *mandamus* adalah drastik dan pada umumnya, hanya boleh digunakan dalam keadaan luar biasa selepas mahkamah berpuas hati bahawa pemohon telah menggunakan semua jalan yang sedia ada.

(2) Kuasa Mahkamah Tinggi tidak terhad kepada mengeluarkan writ prerogatif tetapi berlanjutan setakat membolehkan mahkamah mengeluarkan perintah atau arahan yang sesuai. Parameter campur tangan penghakiman dalam keputusuan tribunal lebih rendah yang tidak mempunyai nexus kepada eksekutif adalah lebih luas. Walau bagaimanapun, tidak terdapat kes-kes berkenaan perkara ini di England atau Malaysia yang dikemukakan oleh pihak-pihak yang menyatakan bahawa keputusan eksekutif boleh digantikan oleh perintah mahkamah. Tiada kes yang menyokong usul bahawa keputusan eksekutif boleh digantikan dalam permohonan semakan kehakiman lebih-lebih lagi apabila terdapat pilihan munasabah lain untuk membolehkan eksekutif mengkaji semula keputusan mereka.

(3) Adalah matan bahawa *mandamus* atau larangan yang terjatuh di bawah writ prerogatif undang-undang lazim dikeluarkan apabila hak undang-undang dan/atau hak perlembagaan telah dicabul dan/atau perintah mahkamah tidak dipatuhi oleh eksekutif dalam semangat dan niat perintah yang dibuat oleh mahkamah. Perintah *mandamus* dan/atau larangan pada peringkat ini adalah pramatang dan perintah yang lebih sesuai adalah untuk membatalkan keputusan perayu yang telah dibuat dengan betul oleh HMT. Sebagai akibatnya, perkara ini diremitkan balik kepada perayu untuk "assessment of the remission".

Case(s) referred to:

Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin [1997] 2 CLJ 248 CA ***(refd)***

Kesavananda Bharati v. State of Kerala & Anor [1973] 4 SCC 225 ***(refd)***

Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh [1997] 2 CLJ 11 SC ***(refd)***

Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor [2014] 2 CLJ 525 FC ***(refd)***

Marbury v. Madison (1803) 1 Cranch 137 ***(refd)***

Nik Nazmi Nik Ahmad v. PP [2014] 4 CLJ 944 CA ***(refd)***

Pathmanathan Krishnan v. Indira Gandhi Mutho & Other Appeals [2016] 1 CLJ 911 CA ***(refd)***

Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***
RK Jain v. Union of India [1993] 4 SCC 119 ***(refd)***
Tata Cellular v. Union of India [1994] 6 SCC 651 ***(refd)***

Legislation referred to:
Customs Act 1967, s. 14A
Sales Tax Act 1972, s. 33

Other source(s) referred to:
Janab's Key to Civil Procedure, 5th edn, pp 440-454

For the appellants - Noor Hisham Ismail & Natra Idris; SFCs
For the respondent - Anand Raj, Foong Pui Chi & Christopher Tay; M/s Shearn Delamore & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Judicial Review Application No: R1-25-431-10 (overruled in part).]

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellants appealed against the decision of the learned High Court Judge on the grounds essentially it was wrong for the learned High Court Judge in a judicial review application to substitute the decision of the executive and/or its department and/or its agencies.

[2] The learned trial judge has taken the position that there is no distinction between the inferior tribunals and the executive decision makers in the sense that the High Court can, in deserving cases and based on the circumstances of the particular case, substitute a different decision in place of the impugned decision of the decision maker without remitting it for re-adjudicating by the decision maker. In that regard, His Lordship says "had no doubt that the reach of the case of *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 is long enough to include decisions made even by the Ministers if the circumstances before the courts so warrant". His Lordship's proposition on the peculiar facts of this case has merits within the jurisprudence of rule of law relating to Constitutional Supremacy as opposed to Parliamentary Supremacy. (See *Pathmanathan Krishnan v. Indira Gandhi Mutho & Other Appeals* [2016] 1 CLJ 911).

[3] We take the view that the jurisprudence articulated by His Lordship must only be applied in extremely rare and urgent cases where there is no alternative relief as it will impinge on the supervisory jurisdiction of the High Court when it relates to executive decision as opposed to inferior tribunals. We will elaborate on this issue further in this judgment. (See *Kesavananda Bharati v. State of Kerala & Anor* [1973] 4 SCC 225; *RK Jain v. Union of India* [1993] 4 SCC 119; *Tata Cellular v. Union of India* [1994] 6 SCC 651).

[4] The said relief sought in the judicial review in the application reads as follows:

(a) an Order of *Certiorari* to move into this Honourable Court and to quash the First Respondent's decision contained in the First Respondent's letter dated 3.8.2010 (hereinafter referred to as "MOF1's Decision") not to consider the Applicant's appeal for a remission under section 14A of the Customs Act 1967 and section 33 of the Sales Tax Act 1972 respectively of the import duties and sales taxes purportedly payable in the amounts of RM699,804.33 and RM3,886,112.02 respectively (hereinafter collectively referred to as the "Duties and Taxes") under a notice of demand dated 21.1.2009 issued by the Second Respondent purportedly covering the period from January 2006 to September 2007 (hereinafter referred to as the "Disputed Notice");

(b) a Declaration that the First Respondent's decision contained in the First Respondent's letter dated 19.4.2010 (hereinafter referred to as "MOF TAD's Decision") refusing to grant any remission under section 14A of the Customs Act 1967 and section 33 of the Sales Tax Act 1972 respectively of the Duties and Taxes purportedly payable under the Disputed Notice is erroneous in law;

(c) an Order of *Certiorari* to move into this Honourable Court and to quash MOF1's Decision that the Applicant is liable to pay the Duties and Taxes purportedly payable under the Disputed Notice;

(d) a Declaration that MOF TAD's Decision that the Applicant is liable to pay the Duties and Taxes purportedly payable under the Disputed Notice is erroneous in law;

(e) a Declaration that the Applicant is entitled to a remission of the Duties and Taxes purportedly payable under the Disputed Notice under section 14A of the Customs Act 1967 and section 33 of the Sales Tax Act 1972 respectively;

(f) a Declaration that the Applicant is not liable to pay the Duties and Taxes purportedly payable under the Disputed Notice;

(g) an Order of Prohibition to prohibit the Respondents from taking any further proceedings arising from any part or the whole of MOF1's Decision and/or MOF TAD's Decision and/or the Disputed Notice, including, without limitation, making demands for payment of the purported Duties and Taxes, issuing notices of demand, or taking any steps to enforce or implement MOF1's Decision and/or MOF TAD's Decision and/or the Disputed Notice or any similar decision or finding of the Respondents in regard to the Duties and Taxes purportedly payable under the Disputed Notice;

(h) an Order of *Mandamus* to compel the Respondents to refund to the Applicant any and all payments of the purported Duties and Taxes, penalties, fines, charges, debts, increases or any additional sums arising from the grant of any relief by this Honourable Court;

(i) costs; and

(j) such further, alternative, consequential or other relief as this Honourable Court deems fit.

[5] Section 14A of the Customs Act 1967 reads as follows:

> 14A. The Minister may, if he thinks it just and equitable to do so, and subject to such conditions as he may deem fit to impose, remit the whole or any part of the customs duties or any other prescribed fees or charges payable under this Act.

Section 33 of the Sales Tax Act 1972 reads as follows:

> The Minister may, if he thinks it just and equitable to do so, and subject to such conditions as he may deem fit to impose, remit the whole or any part of any sales tax due and payable under this Act, or the whole or any part of any penalty payable under the provisions of section 24.

[6] The appellants' complaint has been well articulated in the submission and, *inter alia*, reads as follows:

> 2. The main order concerns with the decision of the High Court in quashing the decision by the 1st Appellant in refusing to allow any remission to the Respondent under section 14A of Customs Act 1967 (in respect of import duties) and section 33 Sales Tax Act 1972 (in respect of the sales tax).
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> 3. The consequential order concerns with the decision on the High Court in not remitting back the matter to the 1st Appellant for his fresh consideration and in granting full remissions thereof to the Respondent instead.

Brief Facts

[7] The learned trial judge has written a meticulous judgment articulating His Lordship's view that *R Rama Chandran* principles can be extended to substitute the decision of the executive in a judicial review application. We do not wish to repeat the facts of the case as it has been repeated in the law journals. (See *Wincor Nixdorf (M) Sdn Bhd v. Minister of Finance and Director General of Customs & Excise* [2013] 1 LNS(A) xlviii).

[8] Irene Yong Yoke Ngor in a recent article published in respect of the decision of the High Court in this case, summarises the facts and the grounds of decision in an articulate manner. (See [2013] 1 LNS(A) xlviii). We have reproduced part of it *verbatim* which reads as follows:

> The Court quashed the MOF's decision and held that while the Minister was given the discretion on whether or not to grant the remission, such discretion was not unfettered, and referred to the Federal Court case of *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* Federal Court,[2] where Justice Raja Azlan Shah AG CJ (Malaya) (as His Majesty then was) held that an unfettered discretion to be a contradiction in terms.

Based on the facts of the instant case, the Court found that WN was a victim in a scam that was well beyond its control. The Court also found that there was uncontroverted evidence tending to point towards negligence on the part of the officers of Customs as the ATM machines had been released from controlled areas within the absolute control and supervision of Customs officers without the proper taxes having been paid for their release.

The Director General of Customs & Excise ("DG") thus had the attendant statutory duty to regulate this activity, as well as the capacity and capability to detect and probe the matter thoroughly and at the earliest opportunity as all the irregular particulars were captured in the declaration Form K1 and these numerous declarations in Form K1 were at all material times in the possession of the Customs.

Further, it was for the Customs to regulate the appointment or accreditation of forwarding agents whom the Customs had licensed to be permitted to clear goods on behalf of their clients.

In this regard, the MOF and DG had contended that the forwarding agents were agents of WN so that WN can recover or otherwise be indemnified by the forwarding agents based on the principal-agent principle. WN, on the other hand, contended that the forwarding agents were merely independent contractors and there was no vicarious liability or fiduciary duty between them.

In holding that the forwarders were not agents of WN, the Court applied the principles enunciated in *Kennedy v. de Trafford*.[3]

The Court held, quoting Lord Greene MR in the case of *Associated Provincial Picture House, Ltd v. Wednesbury Corporation*,[4] that the public expectation of public officials in discharging their public functions, including in exercising their discretion, "must produce a result which does not offend against common sense".

The Court further held that,

> ... had the First Respondent [MOF] taken into account relevant factors such as those alluded to above, he would not have been so misdirected in the exercise of his discretion so as to deny the remission that was urged upon him to be exercised in favour of the Applicant, a remedy that was founded upon the elements of justice and equity that must of necessity be considered on the simple yet hallowed altar of reasonableness.

Subsequent to the substantive decision, the Court granted relief of 100% remission on the duties and taxes on 23rd July 2012.

Conclusion

The power to grant a remission of duties is to be found in a number of tax statutes. The principles enunciated in this case have a far-reaching effect on how such discretionary powers should be exercised.

Jurisprudence And Scope Of Judicial Review In Respect Of Executive Decision And Decision By Inferior Tribunal

[9] The instant case is not related to a decision of an inferior tribunal which was quashed and substituted but it was related to executive decision or its arms in the form of departments and/or agencies under the control of the Minister.

[10] In public law field, there are many types of roles the court plays under the Federal Constitution to provide the relief. In the instant case, two are relevant which relates to judicial review. One type of judicial review is that related to: (i) judicial review of constitutional amendment; (ii) judicial review of legislation; (iii) judicial review of executive decision; (iv) judicial review of policy decision. In all such judicial review, it is well established that the courts will refrain from substituting the decision of Legislature or executive and/or executive arms, etc. The relief in respect of executive decision is often by way of *certiorari* quashing the decision if it has been made arbitrarily and/or breach of constitutional framework. The leading case on arbitrariness often cited by Malaysian courts in *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 where HRH observed:

> Unfettered discretion is a contradiction in terms. ... Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law.

(See *Marbury v. Madison* (1803) 1 Cranch 137; *Nik Nazmi Nik Ahmad v. PP* [2014] 4 CLJ 944; [2014] 4 MLJ 157; *Pathmanathan Krishnan v. Indira Gandhi Mutho & Other Appeals* [2016] 1 CLJ 911).

[11] As a general rule, it is not permissible to substitute legislative and/or executive decision though it may be permissible to order *mandamus*, etc within the framework of the Constitution and the law and/or give prerogative direction which if not complied with may attract the jurisprudence relating to contempt. By quashing the decision means it gives the executive another opportunity to reconsider the decision according to law. Only when constant disobeyance is made, an order of *mandamus* may be issued unless it is related to specific legal right or constitutional right where an order for *mandamus* can be issued in the first instance. It is trite that

a remedy in the nature of *mandamus* is drastic and generally it is only invoked in extra ordinary situations after the courts have been satisfied the applicant has exhausted all other avenues available to him. (See *Janab's Key to Civil Procedure*, 5th edn pp. 440 to 454).

[12] It is now well established that powers of the High Court is not just limited to issuing prerogative writs but extends so far as to enable the court to issue any appropriate orders or directions. This may not be the case in England. Indian Supreme Court authorities are in abundance to say in certain circumstances that the courts have the power to review the decision of the authority on the merits and mould the relief according to the exigencies of the situation in order to satisfy the insistent demands for justice. The test for intervention appears to be that the decision is in defiance of logic and demonstrates patent injustice on the face of record requiring immediate judicial intervention to preserve the rule of law relating to Constitutional Supremacy. (See *Rama Chandran*'s case).

[13] The parameter of judicial intervention in the decision of inferior tribunal which has no nexus to the executive is much wider. When it relates to inferior tribunal, courts have not only quashed the decisions, but also substituted and/or varied the decision. Support for the proposition stated above is found in a number of cases in India as well as Malaysia. However, there is no case directly on point in England or Malaysia cited by the parties to say that the executive decision can be substituted by an order of court as of right. Learned counsel for the respondent was not able to cite any authority in its favour except in reliance of cases such as:

(i) *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145 FC;

(ii) *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 6 MLJ 1;

(iii) *Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11; [1997] 1 MLJ 789;

(iv) *Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin* [1997] 2 CLJ 248; [1997] 2 MLJ 17; and

(v) *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 2 CLJ 525; [2014] 2 AMR 101.

[14] We have carefully perused the above cases and it does not support the proposition that executive decisions can be substituted in judicial review application as of right more so when there were other reasonable options available to enable the executive to review their decision.

[15] It is trite that *mandamus* or prohibition falling under the common law, prerogative writ is issued when a legal and/or constitutional right has been infringed and/or order of court has not been complied by the executive

within the spirit and intent of the orders made by the court. We take the view based on the facts of the case an order for *mandamus* and/or prohibition at this stage is premature and the more appropriate order will be to quash the decision of the appellants which was rightly done by His Lordship. In consequence, we partly allowed the appeal for the matter to be remitted back to the appellants for the 'assessment of the remission' with an order that the parties to bear their own costs.

We hereby ordered so.